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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of

Application of In-Flight Phone Corp. for Pioneer's Preference for a Live News, Information, and Entertainment Service for Airline Passengers

ET Dkt. No. 94-32

PP-_____

To: The Commission

SUPPLEMENT TO IN-FLIGHT'S APPLICATION FOR PIONEER'S PREFERENCE

Pursuant to the Third Report and Order released today in the pioneer's preference docket,[1] In-Flight below supplements its pending application for a pioneer's preference in the licensing of GWCS providers on the 4660-4685 MHz band. In addition, In-Flight requests that the Commission issue a public notice within the next week soliciting comments on In-Flight's pending preference application for reasons discussed below.

BACKGROUND

In October 1992, In-Flight filed an application for pioneer's preference to provide a multi-channel programming service for airline passengers using about 80 ground stations. In-Flight has called its proposed service the "aircraft audio and video programming service" or "AAVS". In-Flight's application is still pending before the Commission. In fact, it has not yet been placed on public notice

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[1] Third Report and Order in ET Dkt. No. 93-266, FCC 95-218 (rel. June 8, 1995).

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In-Flight has asked the agency to consider its preference application in the GWCS docket (ET Dkt. No. 94-32) since rules the Commission has proposed for that service would permit In-Flight to provide AAVS as a GWCS licensee.[2/] By law, the Commission must adopt rules to govern GWCS by August 10.[3/]

In today's Third Report and Order in the pioneer's preference docket, the Commission held that anyone with a pending preference application must supplement that application to conform to the new rules adopted there and in the earlier Second Report and Order in the same docket.[4/] Several rules adopted in those orders do not require supplementation of In-Flight's pending application.[5/] But

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[2/] In-Flight filed its preference application in another docket, but it asked the Commission to consider the application in the GWCS docket last March. See "Pet. of In-Flight Phone Corp. for Decl. Ruling" (filed Mar. 16, 1995). See also n.19, infra.

[3/] See 47 U.S.C. § 309(j)(10)(B)(iii) (stating that the Commission's authority to grant licenses by auction will expire automatically on August 10, 1995, unless the agency adopts all regulations required by 47 U.S.C. § 925(a) by that date). Section 925(a) requires the Commission to adopt rules governing licensing and use of 50 MHz of spectrum abandoned by the U.S. government last summer. The GWCS band is part of that 50 MHz of spectrum.

[4/] Third Report and Order, supra, at ¶¶ 22. See also. Second Report and Order in ET Dkt. No. 93-266, FCC 95-20 (rel. Mar. 1, 1995).

[5/] For example, the Commission ruled in the Second Report that all preference holders must pay for their licenses, and it set forth the formula by which the payment amount would be determined. Second Report, supra, at ¶¶ 19-23. Under this new rule, In-Flight obviously must pay for its license, but the rule requires no supplement from In-Flight. Similarly, the Commission held in the Second Report that henceforth preferences will be awarded only to applicants who demonstrate in their applications the technical feasibility of using the technology they have developed in providing the service they propose. Id. at ¶ 27. This new rule requires no supplement from In-Flight because the company demonstrated the (continued...)

one new rule plainly requires supplementation. That new rule states that henceforth a preference will be granted to an innovator seeking an operating license in a service whose licenses are awarded by auction only if the innovator shows that without a preference it will be unable to recover the investment it made to develop the innovation that is the subject of its preference application.[6/] Under this new rule, In-Flight obviously must supplement its pending application for pioneer's preference in order to make this showing since the Commission has ruled that GWCS licenses will be awarded by auction.[7/]

In Section I below, In-Flight supplements its preference application to make the additional showing required by the Third Report. In Section II, In-Flight explains why the Commission should place the company's preference application on public notice within the next few days.

[5/](...continued)
technical feasibility of its innovation in its application as supplemented by letter dated February 25, 1993. In another new rule, the Commission gives itself discretion to use outside advisors to help it determine whether preferences should be awarded in specific cases. Third Report, supra, at ¶ 18. This rule requires no supplement by In-Flight since it merely describes the process by which the Commission may choose to evaluate particular preference applications. In-Flight has no objection to outside review of its application but does not insist upon it in view of the time constraints described in Section II below. The Commission also has adopted a new rule holding that henceforth preferences will be granted only to an innovator whose proposed service requires a new spectrum allocation. Id. at ¶ 21. This new rule requires no supplement by In-Flight since that the AAVS service In-Flight has developed plainly requires a new spectrum allocation.

[6/] Third Report at ¶¶ 19

[7/] First Report and Order in ET Dkt. No. 94-32, FCC 95-47 (rel. Feb. 17, 1995).

I. It Is Unlikely that In-Flight Can Recover Its Investment to Develop AAVS Unless It Receives a Pioneer's Preference In the Award of GWCS Licenses

There is ample evidence that In-Flight will be unable to recover its more than $5 million investment in developing AAVS unless the Commission grants the company the pioneer's preference it seeks in its pending application First, In-Flight plainly has lost its headstart, and thus part of the value of its innovation, due to the public nature of the FCC's application procedures. Specifically, In-Flight filed an application for experimental license to develop and flight-test AAVS on September 10, 1991.[8/] Applications for experimental license are public documents, and FCC rules governing these applications require disclosure of substantial information about the service to be tested and the technology that will be used to provide the service.[9/] The Commission granted In-Flight's application for experimental license on February 21, 1992, and the company proceeded immediately to fully develop and flight test the essential technology it would use to provide AAVS.[10/] Not surprisingly in view of the public nature of the FCC's application procedures, Claircom, one of In-Flight's two competitors in providing communications services to commercial airline passengers, filed an application for experimental license a few weeks after In-Flight's license was granted. And not sur-

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[8/] See FCC File No. 2234-EX-PL-91.

[9/] See generally 5 C.F.R. §§ 5.1 et seq.

[10/] See letter from Rodney L. Joyce to Dr. Thomas P. Stanley (Feb. 25, 1993) (enclosing a variety of materials documenting In-Flight's progress in developing an AAVS system).

prisingly, the Claircom application was nearly identical to the one In-Flight had filed.[11/] Claircom's application was granted, and the Claircom progress reports submitted pursuant to that license show plainly that the company used its license to perform research on AAVS and that it now is interested in providing AAVS.[12/] But for the public nature of the FCC's licensing process, Claircom probably would not have undertaken its own AAVS development work since it may not have known about the AAVS service In-Flight was developing.

But the damage to In-Flight caused by the FCC's public procedures did not result solely from disclosure requirements in the license application rules. In-Flight was further damaged by the public disclosure requirements contained in FCC rules applicable to pioneer's preference applications. Those rules required In-Flight to disclose additional information about the specific technologies it intends to use in providing AAVS. In-Flight had to make those disclosures in its pioneer's preference application which was filed in October 1992.[13/]

The loss In-Flight has suffered due to the public nature of the FCC's licensing and pioneer's preference application requirements also has been exacerbated by the long amount of time that has

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[11/] See FCC File No. 3071-EX-PL-90. Claircom filed its application April 16, 1992.

[12/] See Claircom's "Experimental License FCC Progress Report" filed Feb. 17, 1993 and "Experimental License FCC Progress Report" filed August 17, 1993.

[13/] Applic. for Pioneer's Pref. (ET Dkt. No. 92-100, filed Oct. 30, 1992).

passed since In-Flight was forced by these FCC policies to disclose information about its innovative AAVS proposal. As indicated above, In-Flight was required by FCC rules to make significant public disclosures about its innovative AAVS proposal almost four years ago when it filed its application for experimental license. And it was required nearly three years ago to make additional public disclosures in applying for a pioneer's preference. Because of these public disclosure rules, potential AAVS competitors now have had several years to develop their own versions of AAVS. As a result, In-Flight plainly has lost a significant part of the value of its innovation.

While the technical innovations that In-Flight developed to facilitate provision of AAVS plainly are patentable, it is doubtful the company can recover its investment to develop these innovations through royalty-bearing licenses since the number of potential patent licensees is so small. The investment required to make technical innovations in telecommunications markets where the number of potential patent licensees is large often may be recoverable through royalty licensing agreements For example, those who develop technologies to provide broadband PCS stand a reasonable chance of recovering their investment through royalty licensing arrangements since the FCC intends to issue more than 2,000 broadband PCS licenses By contrast, it is unlikely In-Flight's cost to develop AAVS can be recovered through royalty bearing licenses since, as a practical matter, there are just two potential patent licensees for the In-Flight technology. In-Flight's technical

innovations relate specifically to the market for providing ground-to-air communications service.[14] Yet only two companies other than In-Flight -- Claircom and GTE -- provide such services. However, even if there were more than two companies other than In-Flight interested in providing AAVS, it still is unlikely that more than two licenses will be awarded to provide the service because the GWCS band contains just 25 MHz of spectrum, and an AAVS licensee needs about 10 MHz of GWCS spectrum to provide a sufficient number of channels of programming to make the service economically viable.

II. The Commission Should Invite Comments on the In-Flight Preference Application Within the Next Week So that It May Decide Whether to Grant In-Flight a Preference in GWCS Licensing by the August 10 Statutory Deadline for Adopting Rules to Govern GWCS

The Commission should issue a public notice inviting comments on In-Flight's preference application within the next week so that the agency can decide whether to grant In-Flight a licensing preference at the same time it adopts regulations governing GWCS service. Commission policy is to announce a pioneer's preference grantee in a particular communications service at the same time rules to govern that service are adopted.[15] As indicated above,

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[14] As In-Flight explains in its preference application, the company made two technical innovations in developing AAVS. First, it developed special circuitry mitigating the effects of multipath interference in ground-to-air transmissions. See Applic. for Pioneer's Pref. at 11-12. Second, it developed rate-buffered switch circuitry in order to provide seamless handoff of ground-to-air communications between terrestrial cell sites. Id. at 12-13.

[15] See, e.g., Second Report and Order, supra, at ¶ 25.

the Commission must adopt regulations to govern the new GWCS service by August 10 -- just two months from now.

Failure quickly to issue a public notice seeking comments on the In-Flight application would be unfair to In-Flight because it would be tantamount to denying the application given that a preference application cannot lawfully be granted under the Administrative Procedure Act unless interested parties have an opportunity to comment on it. In order to promote administrative efficiency, the Commission held in the Second Report and Order in the pioneer's preference docket that it would not issue a public notice inviting comments on preference applications [16/] Instead, the agency decided that it would simply note -- in the notice of rulemaking that proposes to establish rules governing the service for which the preference is sought -- that a preference application had been filed. Those desiring to comment on the preference application then could do so by filing comments by the same deadline that applies for comments in response to the notice of rulemaking.[17/] The Commission's new rule preserves an opportunity for interested parties to comment on any application filed after the rule was adopted. In that case, those desiring to comment on the application may do so at the same time comments in the rulemaking to which the application relates are due, just as the new rule contemplates. The Commission's new rule also preserves an

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[16/] Second Report and Order in ET Dkt. No. 93-266, supra, at ¶¶ 24-25.

[17/] Id.

opportunity to comment on any application filed before the rule was adopted which seeks a licensing preference in a communications service for which a notice of proposed rulemaking had not been issued at the time the rule was adopted In that case, the Commission may call for comments on the application as part of its notice of proposed rulemaking just as the new rule contemplates. But the only way the agency can give parties an opportunity to comment on In-Flight's application is to issue a public notice specifically inviting such comments. This is because the Commission issued its notice of rulemaking to establish regulations governing GWCS before its new rule governing the issuance of public notices seeking comments on preference applications was adopted.[18/]

Nor is there a reason for the Commission not to seek comments on In-Flight's preference application within the next week. In the first place, the Commission plainly does not need to pull In-Flight's application out of the waiting cue in order to place it on public notice within the next few days since In-Flight filed the application nearly three years ago. Moreover, the Commission earlier gave interested parties an opportunity to object to consid-

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[18/] The Commission's notice of rulemaking to establish rules governing GWCS was released in mid-February. See Second Notice of Prop. Rulemaking in ET Dkt. No. 94-32, FCC 95-47 (rel. Feb. 17, 1995). The order adopting the new rule regarding issuance of public notices inviting comments on pioneer's preference applications was released March 1, 1995. Second Report, supra.

eration of the In-Flight preference application in the GWCS docket, and no one lodged an objection.[19]

CONCLUSION

The Commission should grant In-Flight a pioneer's preference in the licensing of GWCS providers for reasons described in In-Flight's preference application as supplemented above. The agency also should invite comments on that application within the next week so that it will be in a position to grant the preference by the August 10 deadline for adopting rules to govern GWCS.

Respectfully submitted,

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[19] As indicated above (n.2), In-Flight formally requested last March that the Commission consider the company's preference application in the GWCS docket. The FCC issued a Public Notice requiring anyone opposing In-Flight's request to file opposition comments by May 19. See Pub. Notice, DA 95-967 (rel. April 28, 1995). No one filed comments.